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16-P-1706

Appeals Court

CARE AND PROTECTION OF VIERI.<sup>1</sup>

No. 16-P-1706.

Berkshire. September 11, 2017. - October 18, 2017.

Present: Green, Sullivan, & Sacks, JJ.

Minor, Care and protection. Parent and Child, Care and protection of minor. Practice, Civil, Care and protection proceeding. Department of Children & Families.

Petition filed in the Berkshire County Division of the Juvenile Court Department on October 26, 2015.

The case was heard by Judith A. Locke, J.

Daniel R. Katz for the mother.  
Andrew J. Haile, Assistant Attorney General, for Department of Children and Families.  
William A. Comeau for the child.

SULLIVAN, J. Vieri's adoptive mother, who is also his maternal grandmother (mother), appeals from an adjudication that Vieri is in need of care and protection pursuant to G. L. c. 119, § 26. On appeal the mother challenges the Juvenile

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<sup>1</sup> A pseudonym.

Court judge's determination that she is currently unfit to parent Vieri. We affirm.

Background. We summarize the judge's findings and the evidence consistent with those findings. Vieri was born in September, 2001. The mother adopted Vieri and his older brother, Alan (a pseudonym), in November of 2006, when Vieri was five years old and Alan was seven.<sup>2</sup>

In June, 2014, the Department of Children and Families (department) began an investigation arising from concerns that Vieri was neglected. A little over a week later, the town health department, which had had ongoing contact with the mother over various issues in the home, responded to complaints of a sewage leak in the home. Ultimately, over 2,500 gallons of raw sewage were removed from the basement.

The mother left Vieri, then thirteen, and Alan "on [their] own most of the summer" of 2015. During this time, Vieri was arrested twice; he was charged with possession of alcohol and shoplifting in July. Later in September, 2015, Vieri was charged with larceny for stealing \$800 from the mother. Vieri testified, and the judge credited, that he took the money because the mother left him and Alan without food. The department subsequently created an interim service plan for the mother, which included cooperating with the department and

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<sup>2</sup> Alan is not a party to this proceeding.

meeting with the assigned social worker, providing food in the home, keeping the home clean, and not leaving Vieri home alone without adult supervision.

In October, 2015, an agent of the town health department went to the home to conduct a site assessment. The agent described the home as that of a "hoarder."<sup>3</sup> The agent also found the outside of the home littered with bulky waste. The basement floor contained sewage residue from the earlier backup, and an area of standing liquid; it was unclear whether this was water or sewage. However, there was some new backup carrying the odor of raw sewage. There was also contaminated furniture in the basement and a contaminated biomat on the basement floor.

As a result of the charges against him, Vieri was placed on pretrial probation on October 20, 2015. On October 25, 2015, at the request of the police, the department's emergency response workers met with Vieri at the police station after he had had a dispute with the mother. Vieri told the workers that he smoked marijuana and had "taken acid," and that his grandmother also smoked marijuana and used pills and cocaine. He stated that he did not want to return home, that there was no heat in the home, and that there was usually no food as well. The department filed the underlying care and protection petition on October 26, 2015. When the emergency response workers subsequently

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<sup>3</sup> The mother described herself as a "packrat."

inspected the home, they found it to be "consistent with that of a hoarder." They informed the mother that the department would take custody of Vieri and would place him in a residential treatment program.

With the help of the town health department and other community involvement, the mother was able to clear much of the clutter from her home beginning in November of 2015. However, in July of 2016, two months before trial, a probation officer went to the mother's home to check on Alan and saw that there remained "a lot of room for improvement" in the home.

On December 2, 2015, Vieri was arrested for assault with a dangerous weapon after he threw a chair at a staff member at an afterschool program. Vieri was placed in the custody of the Department of Youth Services (DYS) pending placement in a residential program selected by the department. At trial, the mother testified that she was not familiar with the program proposed by the department, that she did not know why Vieri was being sent there, and that although she had planned to visit the program, she had not done so by the time of trial. The judge found this to be an "abdication of [her] responsibility" that was "stunning."

In addition to the assault with a chair, the judge found other incidents of violent behavior by Vieri. The mother reported, and the judge apparently credited, that Vieri "had

been destroying [the mother's] house on a daily basis, [that] . . . [Vieri] had broken windows, chiseled a wall with an ice pick, did a lot of damage to the wooden railing, and started fires throughout the house." The health department agent who visited the home in October, 2015, also observed that Vieri had been physically destructive in the home and reported to the court investigator "that the type of destruction . . . was consistent with a person who has mental health issues."

The mother was not amenable to working with the department. The department social worker made multiple attempts to contact her, but she ignored his telephone calls. He left multiple messages for the mother in the three-week period before trial. When the social worker did reach the mother, she told him that Vieri no longer lived in the home and that the social worker did not need to see the inside of the house. During the same three-week period, the probation officer also left messages for the mother, but she did not respond. At trial she testified that she did not "have a very good relationship" with the department and did not wish to be involved with it. The judge expressly found that the mother "chose not to work with the department."

Standard of review. "In a proceeding to commit a child to the custody of the department under G. L. c. 119, § 26, the department bears the burden of proving, by clear and convincing evidence, that a parent is currently unfit to further the best

interests of a child and, therefore, the child is in need of care and protection." Care & Protection of Erin, 443 Mass. 567, 570 (2005). "The findings of the judge must be left undisturbed absent a showing that the findings were clearly erroneous." Care & Protection of Stephen, 401 Mass. 144, 151 (1987). "[T]he judge's findings in a custody proceeding must be specific and detailed so as to 'demonstrat[e] that close attention has been given the evidence and that the necessity of removing the child[ren] from [their] parents has been persuasively shown.'" Ibid., quoting from Custody of a Minor (No. 1), 377 Mass. 876, 886 (1979).

The mother contends that the evidence was insufficient to prove that she was currently unfit. To the contrary, the judge's findings and conclusions are supported by clear and convincing evidence. The judge considered the testimony of the mother, Vieri, Vieri's probation officer, and the department social worker, as well as the court investigator's report. The evidence showed that Vieri lived with the mother in unsanitary conditions. The house remained in disrepair months after a major clean-up effort. See Care & Protection of Vick, 89 Mass. App. Ct. 704, 706-707 (2016). While in the mother's custody, Vieri's negative behavior escalated. He broke windows, damaged walls, and set fires in the home. The mother left Vieri on his own, during which time there was no adult to provide for his

basic needs. He shoplifted alcohol, used drugs, and was arrested. See generally id. at 709-710.

The mother also failed to adhere to the terms of the service plan the department created after Vieri's arrest, which included meeting with department social workers. As noted, the mother admitted that she did not have a good relationship with the department and did not want the social worker in her home. She provided no explanation for her refusal to work with the department. The judge properly considered the mother's continued failure to cooperate with the department in determining that the mother did not have the ability to address her own shortcomings as a parent, or the ability to provide much-needed parental support and guidance to Vieri, whose behavioral and emotional needs were increasingly evident. "Evidence such as the failure of the parents to keep a stable home environment for the children, the refusal of the parents to maintain service plans, visitation schedules, and counseling programs designed to strengthen the family unit are relevant to the determination of unfitness." Petitions of Dept. of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 289 (1987). See Care & Protection of Three Minors, 392 Mass. 704, 713 & n.11 (1984); Adoption of Rhona, 63 Mass. App. Ct. 117, 126 (2005).

The mother contends that several of the judge's factual findings are erroneous. With minor exceptions,<sup>4</sup> all of the judge's findings are fully supported by the evidence. For example, the mother maintains that there was no evidence that her home was in "chaos" because the evidence was not current as of the time of trial. The department's information as to the condition of the home was not fully current because the mother had refused the department social worker access to the home. The judge was permitted to draw a negative inference from the mother's unexplained refusal to cooperate with the department; the judge was not obligated to credit her testimony that there was nothing amiss in the home. See Matter of a Care & Protection Summons, 437 Mass. 224, 236 (2002) (judge permitted to draw adverse inference from parents' earlier refusal to testify regarding whereabouts of child's remains and not required to credit subsequent testimony regarding miscarriage). Cf. Custody of Two Minors, 396 Mass. 610, 616 (1986) (adverse inference drawn from failure to testify); Adoption of Talik, 92

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<sup>4</sup> For example, the judge's finding that the Westfield juvenile detention center was a "highly structured residential facility" is not supported, because there was no evidence at trial about the facility. Nevertheless, the record is replete with evidence of the mother's parental unfitness, and there was ample evidence to support the judge's findings. See Care & Protection of Three Minors, 392 Mass. at 713 & n.11; Care & Protection of Olga, 57 Mass. App. Ct. 821, 825 (2003) (any errors in subsidiary facts found involved minor discrepancies "not central to the ultimate conclusion of unfitness").

Mass. App. Ct. 367, 370-373 (2017) (adverse inference drawn from failure to appear). Drawing an adverse inference in these circumstances does not shift the burden of proof from the department to the mother. See Matter of a Care & Protection Summons, supra at 236 n.21.

In the absence of the mother's cooperation, the judge was also entitled to rely on the evidence that was available to her, which included the observations of the probation officer and health department agent as to the condition of the home. See Care & Protection of Quinn, 54 Mass. App. Ct. 117, 124 (2002) (where father invoked privilege under Fifth Amendment to United States Constitution, judge may otherwise engage in "accurate evaluation of the contents of the record"). Cf. Gath v. M/A-Com, Inc., 440 Mass. 482, 488 (2003) (where party has withheld or destroyed evidence, even if only negligently, the factfinder may consider evidence of the circumstances surrounding the loss of the evidence, and the preexisting state of the evidence.) The evidence before the judge was that of a home that had been in deplorable condition for an extended period. She found that prior to the involvement of the town health department and community volunteers, Vieri had been living in conditions involving "a large amount of clutter[,] filth and chaos," and that the home had not been "appropriate or safe for anyone." The conditions at the time the mother barred the department's

access to the home remained precarious, and there was some risk that it might return to its former state, particularly in light of the mother's refusal to work with the department. See Adoption of Jacques, 82 Mass. App. Ct. 601, 607 (2012), quoting from Adoption of George, 27 Mass. App. Ct. 265, 268 (1989) ("[P]rior history . . . has prognostic value"). This evidence was sufficient to meet the department's burden. See Care & Protection of Quinn, supra.

The mother's failure to cooperate with the department deprived the department of the tools necessary to develop a plan to return Vieri to her home. It may be that she did the best she could,<sup>5</sup> but without her cooperation, the department was left without practical alternatives. Vieri was rapidly deteriorating, and the mother was unable to meet his most basic physical needs, much less address his escalating behavior and need for support and structure. There was no error.

Judgment affirmed.

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<sup>5</sup> The court investigator stated that she presented as a "caring [mother] who is emotionally damaged by the situation with [Vieri and Alan]."